in compliance with Act 77.

I. RESALE-SERVICES AND PRICES

1. WHAT SWBT SERVICES SHOULD BE REQUIRED TO BE MADE AVAILABLE FOR RESALE AT WHOLESALE RATES?

AT&T states that all SWBT services offered at retail to SWBT end users should be available for resale, including promotions of less than ninety (90) days. SWBT states that it believes that it has reached agreement with AT&T on this issue.

Pursuant to 47 U.S.C. §251(c)(4)(A), SWBT is obligated "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." The FCC concluded that the language in the 1996 Act "makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings." FCC Order ¶ 948. AT&T's LBO is consistent with the 1996 Act and the FCC Order implementing this section of the Act. In addition, SWBT states that it has reached agreement with AT&T on this issue. Therefore, AT&T's LBO on this issue is hereby adopted.

2. SHOULD NEW ENTRANTS BE ABLE TO AGGREGATE END USERS IN A SHARED TENANT SERVICES ARRANGEMENT WITHOUT RESTRICTIONS?

AT&T's position is that new entrants should be able to aggregate end users in shared tenant services arrangements without restrictions. SWBT's statement of position appears to agree with AT&T's position with the caveat that SWBT is not required to resell services which it does not offer at retail.

The positions of the two parties are in agreement. SWBT's statement that it need not offer for resale any service it does not offer at retail is consistent with the 1996 Act and the FCC Order.

3. SHOULD PROMOTIONAL OFFERINGS OF 90 DAYS OR LESS BE AVAILABLE FOR RESALE AT THE PROMOTIONAL RATE?

The LBO of AT&T is that such offerings should be available for resale but need not be available for resale at a discount. SWBT's LBO is that promotional offerings of ninety (90) days or less are not available for resale. However, SWBT contends that the associated retail service will be available for resale at the ordinary retail rate less the applicable wholesale discount.

The FCC found that "if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation." FCC Order ¶949. "Promotional prices, service packages, trial offerings, or temporary discounts offered by the local exchange carrier to its end-user customers are not required to be available for resale." Act 77 §9(d). SWBT's LBO on this issue is hereby adopted in compliance with Act 77. SWBT has agreed to a ninety (90) day limitation on the duration of promotional offerings in its LBO, but Act 77 does not place any limitation on the duration of such offerings.

4. SHOULD DISTANCE LEARNING SERVICES BE MADE AVAILABLE FOR RESALE AT THE WHOLESALE DISCOUNT RATE?

AT&T contends that telecommunications services provided below cost should be available at a wholesale discount. SWBT states that services offered to qualifying educational, medical and government institutions are already discounted below retail rates and CLECs can purchase the services at the discounted rates. However, SWBT should not be required to offer a wholesale discount for such services.

SWBT's position on this issue is direct conflict with the FCC Order. The FCC found that "below cost services are subject to the wholesale rate obligation under section 251(c)(4)." FCC Order ¶956. The FCC declined to limit the resale obligations of ILECs with respect to services that may be priced below cost when the 1996 Act does not impose such a limit on resale. Further, the FCC states that "because a service may be priced at below-cost levels does not justify denying customers of such a service the benefits of resale competition." FCC Order ¶956.

Mr. Dan Jackson testified that if SWBT has to resell distance learning services or other services offered to qualifying institutions at a discount to AT&T, it may no longer offer such services at a discount to qualifying institutions such as schools, libraries or health care facilities in rural areas where SWBT does not face competition. Tr. 1293-4. Should SWBT choose not to discount such services in rural areas to avoid its obligation to resell distance learning services at a wholesale discount to AT&T, SWBT would not "have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or ... receive reimbursement utilizing the support mechanisms to preserve and advance universal service." 47 U.S.C. §254(h)(1)(B).

AT&T's LBO that distance learning services must be available for resale at the wholesale rate is in compliance with the FCC Order and is hereby adopted.

5. WHAT RESALE RESTRICTIONS SHOULD BE PERMITTED, IF ANY?

According to AT&T, with the exception of cross class restrictions , all resale restrictions are presumptively unreasonable. AT&T's position is that this presumption applies to restrictions in SWBT's underlying tariffs. It is SWBT's position that "AT&T must abide by the existing Commission-approved use limitations and service parameters in SWBT's retail tariffs." SWBT contends that AT&T confuses resale restrictions with use limitations.

Both the 1996 Act and Act 77, have restrictions on cross-class resale of residential services to nonresidential customers as pointed out by both AT&T and SWBT. With regard to other restrictions, the FCC concludes that:

> [R]esale restrictions are presumptively unreasonable. Incumbent LECs can rebut this presumption, but only if the restrictions are narrowly tailored. Such resale restrictions are not limited to those found in the resale agreement. They include conditions and limitations contained in the incumbent LEC's underlying tariff. As we explained in the NPRM, the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position. FCC Order ¶939.

In 47 C.F.R. §51.613(b), the FCC provides that for an ILEC to impose any restrictions beyond those provided in 51.613(a), it must prove to the state commission that the restriction is reasonable and nondiscriminatory. SWBT cites ¶963-4 wherein the FCC concludes that certain "restrictions are presumptively unreasonable" and others should be "presumed unreasonable" as support for its position that its tariff limitations may be imposed on CLECs purchasing services for resale. The cited provisions of the FCC order conflict with the SWBT position.

SWBT states that end-user use limitations are "approved by the Commission" in SWBT's tariffs for retail services. However, SWBT never explains why the Commission past authority to review tariffs for retail services is relevant to a wholesale sale of telecommunications services. SWBT's tariffs are not subject to Commission review and approval pursuant to Act 77. Any limitations, restrictions or rates contained in SWBT tariffs are solely the responsibility of SWBT and are not subject to regulatory oversight or approval. .

AT&T's LBO complies with the FCC Order and is approved.

6. SHOULD SWBT'S TARIFFS CONTAIN THEIR WHOLESALE OFFERINGS?

AT&T's position is that SWBT should be required to "file tariffs for approval by the APSC" with the terms, prices and conditions of its wholesale service offerings. SWBT contends that it will make its services available for resale through the terms of an interconnection agreement with a CLEC. According to SWBT, an appendix to the interconnection agreement will contain the prices, terms and conditions for resale of telecommunications services.

AT&T's position is contrary to the concept that the interconnection agreement is a contract between the parties which should embody the terms and conditions for resale of telecommunications services by SWBT to AT&T. SWBT's position is adopted.

7. WHAT ARE THE PROPER PROCEDURES FOR CUSTOMERS CHANGING LOCAL COMPANIES?

AT&T's position on this issue is that a customer change process should be implemented which requires that customer changes should be provided at intervals no longer than it takes SWBT to transfer customers between interexchange carriers (IXCs). In an electronic interface environment, where a customer makes no change in the service received or orders fewer services when changing LECs, the charge should be no more than five dollars ($5.00). As a compromise, AT&T offers to agree to a manual order rate of twelve dollars ($12.00). Exh. 13. AT&T contends that customers should be able to add new features at the time of change with the CLEC paying the change charge and the wholesale nonrecurring charges for the added features. SWBT proposes a rate of twenty-five dollars ($25.00) for customer change to a new LEC when the process is manual. It states that it is not opposed to an interim charge of five dollars ($5.00) for electronic interface but opposes a permanent rate until the system is in place and the costs of electronic interface have been determined. SWBT states that it is willing to process change requests in the same interval as it completes orders for itself.

In an environment where there is competition to provide service to local exchange end users, the Commission's primary concern is the end user and the quality of service the end user receives. An end user that chooses to switch LECs should not be penalized for that decision through delays, excess charges or unnecessary inconvenience. The charges proposed herein are not directly assessed to the end user but to the extent that the new carrier has to pay such charges, if the charges are excessive it may cause CLECs to charge higher rates, not enter a market or limit the type and size of end users to which it will offer service. Delays in processing orders to switch service to a CLEC will also have a negative impact on customer choice.

The charges proposed by AT&T were offered as a compromise. AT&T points out numerous flaws in the cost studies of SWBT used as a basis for SWBT's proposed rate which cause the numbers to be excessive. The parties agree that they are working to implement electronic interfaces for the ordering process which will simplify the process and that cost studies will be necessary to set a permanent rate for the electronic interfaces. The ALJ adopts AT&T's LBO.

8. WHAT IS THE PROPER METHODOLOGY FOR DETERMINING THE PRICES FOR SWBT RESOLD SERVICES?

AT&T contends that resale pricing should be based upon avoided cost as defined in the 1996 Act and the FCC Order. AT&T proposes an aggregate avoided cost of 27.46% based upon its cost studies. However, as its LBO AT&T proposed a compromise of 21.6%. SWBT's position is that avoided cost should be determined on a service-by-service basis. SWBT proposes using service groups for determining avoided costs, contending that this method more accurately identifies the costs that will be avoided. However, SWBT proposes an aggregate avoided cost of 14.5%, should an aggregate be used.

47 U.S.C. §252(d)(3) requires that a state Commission determine wholesale rates for resold services on the basis of retail rates charged subscribers for telecommunications services, "excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided" by the ILEC. The FCC found that the avoided costs include all the costs

that the ILEC incurs in maintaining a retail as opposed to a wholesale business. "[T]he avoided costs are those that an incumbent LEC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers." FCC Order ¶911. The FCC rejected the argument that the ILEC must actually experience a reduction in operating expenses for a cost to be avoided. Section 9(g) of Act 77 provides that the wholesale rate "shall be the retail rate of the service less any net avoided costs due to the resale."

Neither the 1996 Act or the FCC Order require a specific type of discount that the Commission must use to determine wholesale rates. Most states have chosen to use aggregate discounts for avoided costs. One of the problems in using SWBT's service by service cost studies for avoided costs is that SWBT's cost studies propose discounts for certain service groups but do not propose discounts for all retail services available for resale. Tr. 1370. Using an aggregate discount will avoid any omission of a retail service available for resale and the potential delay caused by the need to perform a new cost study for a service omitted.

The FCC determined that ILECs must demonstrate "the percentage of avoided costs that is attributable to each service or group of services." FCC Order ¶916. SWBT's service group cost studies do not reflect expenses which are avoidable pursuant to 47 U.S.C. § 252(d)(3). Further, SWBT has not used these cost studies in negotiated interconnection agreements which it has entered into in Arkansas. The ALJ rejects SWBT's service group cost studies for determining prices for resold services. However, the ALJ adopts SWBT aggregate discount of 14.5% as reflecting the most appropriate aggregate resale discount rate. Tr. 1436-8.

SWBT's final statement on this issue is that the discount should not apply to custom contract services or services provided to qualifying institutions. This issue has been addressed in Issue No. I (1)(2)(4) and (5). The acceptance of SWBT's aggregate discount does not amend any previous decision.

Issues No. I (9-20) concern the avoided cost calculation for various accounts. Having adopted SWBT's aggregate discount as the LBO, the individual treatment of accounts has no impact on the aggregate discount adopted.

9. ARE PRODUCT MANAGEMENT COSTS IN THEIR ENTIRETY AN AVOIDED COST?

AT&T's position is that all such expenses are avoided. SWBT's position is that no expenses in this account are avoided.

SWBT failed to prove that specific costs in this account are not avoidable in compliance with 47 C.F.R. §51.609(c) & (d). The ALJ adopts AT&T's position.

10. WHAT PERCENTAGE OF SALES EXPENSES IS AN AVOIDED COST?

AT&T's position is that all expenses are avoided. SWBT's position is that a proprietary % of expense is avoided.

SWBT has demonstrated that a reasonable portion of expenses would be avoided. AT&T's witness agreed that there would be some expenses which would not be avoided. Tr. 1516.

11. ARE ADVERTISING EXPENSES IN THEIR ENTIRETY AN AVOIDED COST?

AT&T claims that such expenses are avoided. SWBT contends that advertising expense is not avoided.

The position of SWBT on this issue is contrary to the FCC's rules and wholly unsupported. SWBT's witness Dr. William Boulding chose not to consider the advertising experience of resellers of telecommunications in the evidence he presented on advertising by wholesale product distributors. Instead, he chose products unrelated to telecommunications to support his theories. There is no support for SWBT's position that it would have no avoided advertising expense. The ALJ adopts AT&T's LBO.

12. ARE CALL COMPLETION COSTS (OPERATOR SERVICES) IN THEIR ENTIRETY AN AVOIDED COST?

AT&T's position is that the costs are avoided. SWBT contends that the cost are not avoided.

In 47 C.F.R. §51.609(c)(1), Call Completion Costs are considered avoidable unless the ILEC proves that such costs are not avoided. SWBT fails to prove that such costs would not be avoided. The ALJ adopts AT&T's LBO.

13. ARE NUMBER SERVICE COSTS (DIRECTORY ASSISTANCE) IN THEIR ENTIRETY AN AVOIDED COST?

AT&T contends that number services costs would be avoided in their entirety which is consistent with the 47 C.F.R. §51.609(c)(1). SWBT fails to prove that none of these costs would be avoided as it contends. SWBT offers three free directory assistance calls monthly to its subscribers. When a SWBT subscriber switches to a CLEC, SWBT avoids the expense associated with the free directory assistance calls to which the former subscriber would have been entitled. However, SWBT failed to even acknowledge this avoided cost in its study. AT&T's LBO is adopted.

14. ARE GENERAL & ADMINISTRATIVE COSTS AN AVOIDED COST WHEN SWBT IS WHOLESALING A LOCAL SERVICE?

It is SWBT's contention that no general and administrative costs would be avoided. The FCC found that some indirect costs are avoidable and likely to be avoided when the ILEC provides service on a wholesale basis. The FCC reasoned that indirect expenses could be expected to decrease as a result of a reduction in retail activity and such expenses are presumed to be avoided. FCC Order ¶912, 918. AT&T's LBO is adopted.

15. WHAT PERCENTAGE OF TESTING AND PLANT ADMINISTRATION COSTS ARE AN AVOIDED COST?

AT&T advocates a 20% avoided cost factor for these expenses and SWBT claims no avoided costs. SWBT's LBO is adopted for this issue. In resale of service, SWBT continues to maintain control of its facilities and is responsible for the maintenance and testing of such facilities.

16. WHAT PERCENTAGE OF UNCOLLECTIBLE EXPENSES IS AN AVOIDED COST?

SWBT claims that uncollectible expenses are only partially avoided in resale to AT&T. However, AT&T contends that it will be fully responsible for all charges. Therefore, uncollectible expenses will be avoided costs and AT&T's LBO is adopted.

17. SHOULD LSP START UP COSTS BE INCLUDED?

Ms. Barbara Smith, SWBT's witness submitted a Schedule showing costs which SWBT alleged to have incurred in establishing a Local Service Provider Service Center (LSPSC). However, Ms. Smith admitted that the costs shown had not been incurred by SWBT but represented projected expenses for an LSPSC with no supporting evidence of the actual expenses. Tr. 1548-9. AT&T's LBO on this issue is adopted.

18. SHOULD ACCESS EXPENSE/REVENUES BE USED IN THE CALCULATIONS OF AVOIDABLE COSTS?

The parties appear to agree that these expenses/revenues should not be included in the calculation of avoidable costs.

19. SHOULD RETURN BE CLASSIFIED AS AN AVOIDED COST?

AT&T contends that return is avoided to the extent investment is avoided in a wholesale environment which is consistent with the FCC Order. The FCC found that treating a portion of return on investments attributable to assets used in avoided retail activities as an avoided cost is consistent with the 1996 Act. FCC Order ¶913. AT&T' LBO is adopted.

20. WHAT PORTION OF ACCOUNT 6623 (CUSTOMER SERVICE EXPENSES) IS AVOIDED?

AT&T claims that all retail customer service expenses are avoided but SWBT contends that these expenses are only partially avoided. SWBT calculated a reasonable percentage of the expenses that would be avoided and SWBT's LBO is adopted.

21. WHAT REVENUES SHOULD BE UTILIZED IN THE CALCULATION OF THE AVOIDED COST DISCOUNT?

AT&T contends that revenues associated with any telecommunications service SWBT offers at retail to subscribers who are not telecommunications service providers should be included. SWBT contends that AT&T's position ignores the difference between the cost of providing local service and the revenues for local service. SWBT's position appears to be that the calculation of avoided should be based upon the total of SWBT's revenues including subsidies flowing to local service from access charges and other subsidies. This is inconsistent with SWBT's position on Issue No. I (18), the 1996 Act and Act 77. Both the Federal and state acts provide for wholesale rates to be calculated based upon retail rates. Neither Act provides for including subsidies in the calculation of wholesale rates.

II. RESALE-OPERATIONAL ISSUES/ELECTRONIC INTERFACES

1. SHOULD SWBT BE REQUIRED TO PROVIDE THE FULL COMPLIMENT OF ORDERING AND PROVISIONING FUNCTIONALITY THROUGH ELECTRONIC INTERFACES FOR UNBUNDLED NETWORK ELEMENTS AND TOTAL SERVICE RESALE?

The parties appear to have reached agreement on virtually all electronic interface issues with the exception of "as is" ordering of UNEs which is addressed in Issue No. II (3). SWBT's LBO on this issue is adopted.

2. WHAT IS A REASONABLE PERIOD FOR ADVANCED NOTIFICATION OF NEW SERVICES AND CHANGES OF TARIFFED SERVICES?

The parties have reached agreement on this issue.

3. SHOULD SERVICE INTERRUPTION OF NEW ENTRANTS CUSTOMERS BE ALLOWED WHEN CUSTOMERS CHANGE FROM ONE LOCAL SERVICE PROVIDER TO ANOTHER WITHOUT A CHANGE IN SERVICE?

The primary issue herein is the question of "as is" ordering of UNEs. AT&T contends that it should be able to place an "as is" order for UNEs when a customer is changing service providers without any change of features or functions and with no service interruptions. AT&T's position on the issue would treat provision of service through resale and through UNEs as the same manner of providing service. However, resale and service through UNEs is not the same activity. When AT&T provides service through UNEs, it is in essence choosing the components of a network it needs to provide service and configuring those components to meet the needs of its customers. AT&T bears the responsibility for combining the components to meet the needs of its customer and placing the appropriate order with SWBT to meet AT&T's requirement for service to AT&T's end user. UNEs offer the CLEC a greater opportunity to provide customers with new and unique services but it also entails greater responsibility in ordering and accessing the appropriate UNEs to meet the needs of the customer.

Service interruptions to end users should be avoided whenever possible. The end user should not be penalized for choosing a different service provider. However, SWBT witness Mr. William Deere testified that service interruptions occur even when a customer stays with SWBT but requests new features or functions in a phone system. SWBT's LBO is adopted on this issue. As the monopoly provider of local exchange service with control of the network, SWBT has little incentive to accommodate the needs of AT&T or the needs of customers choosing to leave SWBT and take service from AT&T. Changes from SWBT to AT&T should be monitored to insure that no end user is penalized or required to unnecessarily disconnect and reconnect service as a means to discourage changes in service providers.

III. OPERATOR SERVICES AND DIRECTORY ASSISTANCE

1. SHOULD SWBT BE REQUIRED TO CUSTOMIZE THE ROUTING OF OPERATOR SERVICES AND DIRECTORY ASSISTANCE CALLS TO AT&T'S PLATFORMS WHERE AT&T PURCHASES RESOLD SERVICES UNDER SEC. 251 (C)(4) OR STATE LAW OR PURCHASES UNBUNDLED NETWORK ELEMENTS UNDER SEC. 251 (C)(3) OR STATE LAW?

AT&T claims that the parties have reached agreement on this issue with the exception of the issue of routing intraLATA toll calls. Therefore, the ALJ will accept SWBT's LBO as representing the parties agreement on this issue with the exception of the issue of intraLATA toll. The routing of intraLATA toll calls is addressed in Issue No. V (1).

2. SHOULD SWBT BE REQUIRED TO DELIVER OPERATOR SERVICES AND DIRECTORY ASSISTANCE CALLS, ALONG WITH THE REQUIRED SIGNALING AND DATA TO AT&T FOR COMPLETION?

AT&T states that the parties have reached agreement on this issue with the exception of intraLATA toll routing. Therefore, the ALJ will adopt SWBT's LBO as reflecting the agreement of the parties with the exception of intraLATA routing which is addressed in Issue No. V (1).

IV. BRANDING

1. ISSUE RESOLVED.

2. SHOULD SWBT BE REQUIRED TO BRAND INSTALLATION, MAINTENANCE, AND REPAIR SERVICES IN THE NAME OF AT&T WHEN PROVIDED BY SWBT TO AT&T CUSTOMERS?

The parties LBOs on the issue appear to be in agreement with AT&T's proviso "until SWBT resolves the technical issues necessary to identify the local service provider by name."

V. UNBUNDLING AND PRICES.

1. Should SWBT provide the full functionality of UNEs, inclusive of intraLATA toll and exchange access, to new entrants?

AT&T claims that SWBT should provide the complete functionality of UNEs to AT&T including intraLATA toll and exchange access. AT&T claims that for intraLATA toll this should be comprised of message toll service, directory assistance (DA) and operator services. SWBT addresses only the issue of intraLATA toll stating that nothing in the 1996 Act gives AT&T the right to have 1+intraLATA toll calls placed over UNEs purchased from SWBT without compensating SWBT for the appropriate toll charges. SWBT proposes that when an AT&T customer places a 1+ or 0+ intraLATA toll call, SWBT will bill AT&T its intraLATA toll rates and SWBT will keep the revenues.

Pursuant to 47 U.S.C. §271(e)(2)(D), AT&T cannot have intraLATA toll dialing parity with SWBT until SWBT receives approval from the FCC to provide interLATA toll service or three years form the date of enactment of the 1996 Act. There is no authority in the 1996 Act to use UNEs as a means to avoid this restriction on AT&T's ability to compete with SWBT. Therefore, the ALJ adopts SWBT's position with the exception that SWBT must compensate AT&T for any applicable access charges for intraLATA toll. When AT&T purchases UNEs from SWBT, it purchases the "rights to exclusive use of unbundled loop elements ... and will have to provide whatever services are requested by the customers to whom those loops are dedicated." FCC Order ¶357. SWBT is accessing that network to provide toll service to an AT&T customer when it carries a 1+ or O+ intraLATA toll call for an AT&T customer. SWBT must compensate AT&T for access at the same rates AT&T would be required to compensate SWBT for access. However, such compensation will be paid to AT&T outside the existing Arkansas pooling system. Act 77.

2. SHOULD SWBT PROVIDE ADDITIONAL INFORMATION REGARDING A UNE IF REQUESTED BY AT&T?

AT&T requests that SWBT be required to provide a reference list of vendor documentation and to provide other information on UNEs. SWBT contends that it does not maintain such information for its own services and should not be required to do so for AT&T.

SWBT's LBO is adopted. AT&T should be responsible for obtaining additional information it seeks on UNEs.

3. HOW SHOULD NONRECURRING COSTS BE RECOVERED BY SWBT?

SWBT states that nonrecurring costs of providing a UNE should be recovered through a one-time nonrecurring charge at the time of provisioning the UNE. AT&T's LBO would provide for these charges to be spread over a period of time in a monthly rate. Both parties agree that development costs of gateway and operation interfaces should be recovered from all demand in a competitively neutral manner.

The recovery of costs through recurring charges is common practice in the telecommunications industry. FCC Order ¶749. Allowing nonrecurring charges to be recovered over a reasonable period of time and ensuring that such charges are imposed equitably among new entrants is reasonable. Tr. 884.

4. WHAT UNBUNDLED NETWORK ELEMENTS SHOULD SWBT PROVIDE TO AT&T?

AT&T requests that SWBT provide access to thirteen UNEs which exceeds the minimum UNEs ordered by the FCC to be unbundled. SWBT contends that it will make nine UNEs available to AT&T, including Loop Cross-Connect. AT&T alleges that Loop Cross-Connect is not actually an element which can be unbundled but is an integral part of other elements which allows those elements to be used as a UNE.

This issue and Issues No. V (6, 7 and 8) are all interrelated. The underlying issue is the extent to which SWBT must unbundle its network. Decisions on Issues No. V (6, 7 and 8) may to some extent modify the decision on this issue.

Both AT&T and SWBT propose UNEs that exceed the minimum unbundling required by the FCC. AT&T contends that the additional element of Loop Cross Connect proposed by SWBT is not an element but a functionality of the loop. Tr. 778. SWBT alleges that the FCC required that ILECs unbundle this element in the FCC Order, however SWBT concedes that the

FCC did not include this as an unbundled element in its rules. Tr. 792-4. SWBT cites ¶386 of the FCC Order in support of its position. In that paragraph, the FCC found that ILECs must provide cross-connect facilities to provide access to the loop and highlighted the requirement because of allegations that ILECs had imposed unreasonable rates, terms and conditions for cross-connect facilities in the past.

The additional elements requested by AT&T require that SWBT provide subloop unbundling. The FCC provided a minimum list of UNEs that ILECs must provide and provided that for elements beyond those specified, the state commissions should determine whether "it is technically feasible for the incumbent LEC to provide access to a network element on an unbundled basis." 47 C.F.R. §51.317(a). Although SWBT's testimony on this issue is in some instances extreme and an overreaction to the concept of unbundling, SWBT does provide evidence that it is not technically feasible to provide the subloop unbundling requested by AT&T at this time and that further unbundling could damage the integrity of the network. The ALJ declines to order any additional unbundling at this time based upon the evidence presented. The ALJ adopts the LBO of SWBT.

5. WHAT SHOULD THE UNE INCLUDE?

AT&T requests that the UNE include all features, capabilities, and functionality inherent to the UNE that may be used to provide telecommunications service. SWBT agrees with this position with the exception of 1+ intraLATA toll. SWBT also includes a statement regarding costs which is misplaced in this issue. Eliminating SWBT's statement on cost which is not correctly a part of its LBO on this issue, the ALJ adopts the LBO of SWBT. The intraLATA 1+ issue was addressed in Issue No. V (1).

6. SHOULD THE APSC ORDER SWBT TO GO FURTHER IN UNBUNDLING ITS NETWORK THAN THE FCC REQUIRED?

This issue has been addressed in Issue No. V (4) and Issue No.V (8).

7. IS SUB-LOOP UNBUNDLING TECHNICALLY FEASIBLE, AND IF SO, UNDER WHAT TERMS AND CONDITIONS SHOULD IT BE OFFERED?

With the exception of Issue No. V (8), the ALJ has adopted SWBT's position that sub-loop unbundling is not technically feasible and would substantially reduce SWBT's ability to manage and control its network. See Issue No. V (4).

8. SHOULD AT&T HAVE ACCESS TO SWBT'S UNUSED TRANSMISSION MEDIA ("DARK FIBER")?

AT&T requests that SWBT make available unused transmission media, also known as dark fiber, as an unbundled network element. SWBT contends that it should not be required to provide dark fiber as a UNE because the FCC did not specifically order that it be unbundled, it is not technically feasible to provide dark fiber and dark fiber is not "used" in the provision of telecommunications service.

Just as the FCC did not require that Loop Cross-Connects be provided as an unbundled network element, the FCC did not specifically order that dark fiber be unbundled, at this time. However, the FCC did defer to the state commission the decision on the technical feasibility of further unbundling of the ILEC's networks, including dark fiber.

Dark fiber is the excess transmission media which with the addition of electronics can be used to provide telecommunications service. It is fiber deployed in anticipation of network growth or to accommodate the cable sizes manufacturers offer. Tr. 771. Thus, only that portion of the fiber cable which SWBT does not need is classified as dark fiber. Other fiber within the same cable may be used for telecommunications service and the dark fiber could at any time needed be used to provide telecommunications service. SWBT's contention that dark fiber cannot be a network element because SWBT is not presently using it to provide telecommunications service could logically be extended to other elements to prevent other services or facilities from being classified as network elements. According to SWBT's position, all that is required to deny a CLEC access to an unbundled network element is to declare the capacity to provide a service as excess and unused at the time to provide telecommunications service. SWBT deploys facilities based upon projections. Tr. 803. According to its interpretation, SWBT could declare any facility, such as copper cable, that was deployed for future growth not an element used to provide service and not subject to unbundling. This argument could too easily be used to defeat the intent of the 1996 Act.

SWBT also contends that it is not necessary to unbundle dark fiber for AT&T to provide the services it desires to offer. Mr. Deere testified that AT&T could build its own facilities to provide service or obtain service from another company such as American Communications Services of Little Rock, Inc. or Brooks Fiber. This same suggestion was advanced by some ILECs in regard to unbundling of network elements in the FCC proceeding. The FCC rejected the ILECs arguments finding that "[r]equiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act." FCC Order ¶286. The FCC further stated that duplication of the ILECs network could be inefficient and unnecessary. ¶287. SWBT's position that AT&T be required to build its own facilities or purchase the facilities from other providers would defeat the purpose of 47 U.S.C. 251(c)(3) and has been generally rejected by the FCC. In addition, requiring CLECs to build facilities when SWBT has excess capacity which CLECs could use to provide service could lead to stranded investment for SWBT. SWBT would have to recover the cost of those facilities from its remaining subscribers but those facilities might never be used due to the duplication of facilities.

In attempting to explain why it would not be technically feasible to unbundle dark fiber, Mr. Deere used the circular logic that it would not be technically feasible to unbundle dark fiber because SWBT could not test the fiber if it was unbundled. However, he stated that SWBT cannot test the fiber now because it is impossible to test the fiber without the electronics on the fiber. Tr. 796. Mr. Deere's explanation demonstrates that SWBT's technical infeasibility argument is without merit, especially in light of AT&T's testimony that it will provide testing of such facilities. In essence, Mr. Deere could provide no credible reason why it is not technically feasible to provide dark fiber as a UNE as SWBT has been ordered to do in three other states.

From an economic stand point, it appears that unbundling dark fiber would benefit

SWBT and its subscribers. With unbundling, AT&T would put the fiber to use and compensate SWBT for that usage.

The ALJ adopts the LBO of AT&T.

9. TO WHAT EXTENT SHOULD AT&T BE PERMITTED TO COMBINE NETWORK ELEMENTS?

AT&T states that there should be no restrictions on its ability to combine network elements. The only difference in the position of SWBT and AT&T on this issue is SWBT's contention that when AT&T combines UNEs to provide a service identical to one offered by SWBT, AT&T should be charged as though it was reselling a SWBT service instead of the rates for the individual UNEs.

The ALJ adopts the LBO of AT&T. The FCC found that the language of 47 U.S.C. §251 (c)(3) "bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend." FCC Order ¶292. SWBT seeks to limit AT&T's use of UNEs by imposing higher rates if AT&T combines UNEs to provide a service SWBT provides. The FCC has found such restrictions contrary to the 1996 Act.

10. SHOULD SWBT BE REQUIRED TO PROVIDE FACILITIES OR EQUIPMENT NECESSARY TO SATISFY A REQUEST FOR UNES THROUGH A SPECIAL REQUEST PROCESS?

The only apparent disagreement between SWBT and AT&T on this issue is the use of the term Bona Fide request by SWBT and AT&T's use of the term Special Request Process. SWBT states that it should be compensated for the effort to process and develop such requests. The ALJ adopts the LBO of AT&T. See Issue No. V (12).

11. SHOULD SWBT PROVIDE ADDITIONAL INFORMATION REGARDING A UNE IF REQUESTED BY AT&T?

See Issue No.V (2).

12. SHOULD AT&T BE ABLE TO CANCEL A NETWORK ELEMENT SPECIAL REQUEST AT ANY TIME?

AT&T maintains that it should be able to cancel such a request at any time and only be responsible for the cost of any additions and/or modifications to SWBT's network as a result of the request. SWBT contends that it should be compensated for any effort to process and develop a Special Request from AT&T which is canceled.

The ALJ adopts the LBO of AT&T. In responding to a Special Request for a UNE, the initial expenses of SWBT are the basic costs of doing business. This is no different from SWBT's preparation of a response to a request from a business customer for a proposal to provide PLEXAR Custom service or preparation of other proposals to provide service to one of SWBT's customers. However, when SWBT incurs expenses for modifications or additions to fulfill a request which is canceled, AT&T should compensate SWBT for its expenses.

13. WHEN SWBT RECEIVES A REQUEST FOR A UNE(S) WHICH DOES NOT HAVE AN ESTABLISHED PRICE, WHAT TIME FRAMES SHOULD SWBT HAVE FOR RESPONDING?

AT&T recommends that SWBT provide a price quote within ten (10) days when AT&T requests a UNE that is operational but not priced, and a time period of ten (10) days to agree to a schedule and procedure for processing a request when AT&T requests a UNE that is not operational. AT&T recommends that the schedule not exceed ninety (90) days. SWBT does not recommend any time frame for it to respond to such requests but states that ten (10) days is unreasonable.

The ALJ adopts AT&T's LBO. The time frame proposed by AT&T appears to be reasonable and SWBT's unwillingness to agree to any schedule is unreasonable. SWBT contends that it should not be required to respond within a reasonable time because "SWBT believes that this is an attempt to divert SWBT resources from the job of serving its own customers..." Tr. 494. The argument of SWBT is primarily based upon its own unsupported speculations and conjecture. Should it develop that AT&T abuses the process, SWBT can file a complaint.

14. SHOULD SWBT BE REQUIRED TO ACTIVATE SERVICES FOR AT&T?

Apparently the parties agree that it is necessary for service to be activated, however, SWBT states that it has not agreed to accept "as is" orders. "As is" orders have been addressed in Issue No. II (1).

15. SHOULD SWBT BE REQUIRED TO PROVIDE ALL TECHNICALLY FEASIBLE TYPES OF MULTIPLEXING, DEMULTIPLEXING, GROOMING, DIGITAL CROSS-CONNECT SYSTEMS (DCS), BRIDGING, BROADCAST, TEST AND CONVERSION FEATURES WHEN AND WHERE AVAILABLE?

AT&T contends that SWBT should be required to provide the referenced services to AT&T on the terms and conditions that SWBT provides the services to itself. SWBT contends that the FCC only required that it provide DCS to AT&T in the same manner and through the same tariffs in which SWBT offers the service to IXCs.